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No. 90-401

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BETSEY WARREN LEBBOS,

Petitioner

vs.

SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Respondent

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

G.G.BAUMEN, ESQ.(Pro Se)
Lawyer
1950 Sunset Boulevard
Los Angeles, Ca. 90026

213-484-9161

Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT Of PETITIONER

Now comes G.G. Baumen, Esq., a duly licensed California attorney. He respectfully requests permission to file a brief Amicus Curiae in support of the Petition being granted.

Pursuant to United States Supreme

Court Rule 37.1, Amicus is interested in the issues presented as a California lawyer.

He wishes to bring to the Court's attention the legislative history behind the creation of an asserted State Bar Court of the California State Bar Association, which material has not been and may not be presented by the parties.

Pursuant to United States Supreme Court rule 37, this Amicus brief should be dispositive of the issue of whether the principles of Comity and Full Faith and Credit should apply to statutes that appear to be unconstitutional Bills of Attainder.

This motion is being filed as opposing party, Supreme Judicial Court, and Bar Counsel have not returned the written consent required

of United States Supreme Court Rule 37.2.

RESPECTFULLY SUBMITTED,

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Lawyer
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QUESTION PRESENTED

1. May a State grant Full Faith and Credit or Comity to state statutes that are Bills of Attainder ?

LIST OF PARTIES

The parties in the Petition for a Writ of Certiorari are as follows :

BETSEY WARREN LEBBOS, ESQ.
P.O. Box 40
New Almaden, Ca.
95042-0040

Petitioner Attorney

HON. PAUL J. LIACOS
Senior Justice
Supreme Judicial Court of The Commonwealth of Massachusetts
Room 1412, Court House
Boston, MA. 02108

Respondent Court

DANIEL J. KLUBOCK, ESQ.
Bar Counsel
Board of Bar Overseers
75 Federal Street
Boston, Mass. 02110

Respondent Bar Counsel

Table of Authorities

Brotsky v. State Bar (1962) 57 Cal. 5 2d. 287, 300-301 — 6

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In re: Lavine (1935) 2 Cal. 2d. 324,328 6

In re: Shattuck (1929) 208 Cal. 6 6

Jacobs v. Board of Dental Examiners (1938) 75 P.2d 96, 24 C.A. 2d 359 9

Hinds v. State Bar (1941), 19 C.2d 77, at p. 93. 6

Hustedt v. Workers Comp. Appeals Bd., 30 Cal. 3d. 329, 337 9

Katz v. Workers Compensation Board (1981) 178 Cal. Rptr. 815, 636 P.2d 1153, 30 C.3d 353 9

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Amicus' Interest

Amicus appears as an interested California attorney who has researched the California state statutes at issue and their history and believes the Petition should be granted

as they appear to be unconstitutional Bills of Attainder as well as a denial of fundamental due process of law for California attorneys.

Amicus understands that the statutory complex may appear confusing at first view and submits the attached in the hopes it helps to clarify it for this Honorable Court, so that it can grant the Petition and find for the Petitioner.

Constitutional Provisions Involved

United States Constitution Amendment V. No person ... shall be deprived of life, liberty, or property, without due process of law...

Article I, section 10, clause 1. No State shall ... pass any Bill

of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...

Summary of Argument

The Petition should be granted as California statutes creating a State Bar Court and permitting a state bar association person to " suspend " an attorney by claiming to enroll them involuntarily as an inactive member of the California State Bar Association are unconstitutional Bills of Attainder.

Argument

I.

The State Bar Court was created by accident

Amicus undertook a review of the legislative history in order to ascertain how the state statutes creating an asserted State Bar

Court and licensing by the California State Bar Association came about.

On March 4, 1985 Assemblyman Charles M. Calderon, Assemblyman from Montebello introduced AB 1275. Its preamble stated the following:

" Existing law, the State Bar Act, authorizes the Board of Governors of the State Bar of California, to establish one or more committees, known as disciplinary boards, to act in its stead in the determination of disciplinary and reinstatement proceedings. Two of the members of any such Board are required to be public members, who are appointed by the Governor. The rules of procedure adopted by the Board of Governors establish the State Bar Court organized as specified, which is responsible, among other things, for disciplinary and reinstatement proceedings.

This bill would amend the State Bar Act to specify the inclusion of the State Bar Court in certain provisions relating to the internal organization of the State Bar and its disciplinary proceedings."

The bill creating the State Bar

Court was passed on the erroneous belief that, if the 23 member Board of the California State Bar Asso - ciation created a Court by inter- nal rule, that the legislature could then merely affirm these internal acts and make it State Law.

This Court's decision in Keller v. State Bar of California, (1990) 495 U.S.____, 110 L. Ed. 2d. 1, 110 S. Ct.____, overruling 767 P.2d. 1020, 255 Cal. Rptr. 542 (1989), however, makes clear the California State Bar Association is a private association and not a governmental agency for purposes of application of the United States Constitution.

The constitutionality of the State Bar Act of 1927 was condi-

tioned on the association having no court, no judicial power, and its role being, as stated in Keller, supra, solely advisory to the Judiciary. Brotsky v. State Bar (1962) 57 Cal. 2d. 287, 300-301; Byrdonjack v. State Bar (1929) 208 Cal.439, 443, In re Lavine (1935) 2 Cal. 2d. 324, 328, In re: Shattuck (1929) 208 Cal. 6, 12; Saleeby v. State Bar (1985) 39 Cal. 3d. 547.

When the Legislature believed it could allow a private membership trade group to have a Court, they set in motion an invasion of Article 6, Section 1 of the California Constitution. That section provides all judicial power in the State is in the listed Courts. They also set in motion an abridgement by the Legislature of Article 6, Section

9 of the California Constitution which provides that the California State Bar Association is a corporation in the Judicial, and not the Legislative branch of Government.

In its final form, the Legislative Digest's comment provided the bill's purpose, as applicable herein, was as follows:

" This bill would amend the State Bar Act to, among other things, make various changes in the procedures for disciplining of attorneys, including specifying that these procedures are undertaken under the jurisdiction of the State Bar Court rather than disciplinary boards, providing that the Board of Governors may order the involuntary inactive enrollment of an attorney upon a finding that the attorney's conduct poses an imminent threat of harm to the attorney's clients or to the public..."

Later the " imminent threat " and " harm " requirements were deleted. The statute now states an

attorney may be involuntarily enrolled as an inactive member of the California State Bar Association by it if the " attorney's conduct poses a substantial threat of harm to the interests of .... clients or the public. " With interests being protected, and no actual harm required, jaywalking qualifies.

In sum, the bill not only gave the Board of the State Bar of California, against the will of its members and the United States and State Constitutions, the right to create a private Court, it also gave it judicial power to deprive attorneys of their right to use their valid licenses, granted not by the Legislature, but by the California Supreme Court.

This placement of judicial

power in a private membership trade group was in direct violation of existing California state law prohibiting the legislature granting any entity any judicial power. Hustedt v. Workers Compensation Appeals Board (1981) 178 Cal. Rptr. 801, 636 P.2d 1139,; Jacobs v. Board of Dental Examiners (1938) 75 P.2d 96, 24 C.A. 2d 359; Katz v. Workers Compensation Board (1981) 178 Cal.Rptr. 815, 636 P. 2d 1153, 30 C. 3d 353, Laisne v.State Board of Optometry, (1942) 123 P.2d 457, 19 C.2d 831; Lorber v. Storrow (1937) 70 P. 2d 513, 22 C.A. 2d 25 MacCracken v. Board of Medical Examiners (1938) 74 P. 2d 289, 24 C.A. 2d 58; Perry Farms Inc, v. Agr. Labor Relations Board, 86 Cal. App. 3d. 460, 150 Cal. Rptr. 495.

II.

The State Bar Court is Unconstitutional as not within the Police Power of a State

The legislative history implies that, because the Governor appoints two persons on the 23 member board of the California State Bar Association by statute, that this is a sufficient public nexus to permit the association to create a private court.

Rather than inquiring whether the statute was necessary for the public's health, welfare, or morals, the inquiry was limited to solely the fact that the Governor appoints two persons to sit on its board.

Since the police power of a state does not comprehend adopting

as State law the private rules of a trade group, and is a law of necessity exercisable only for the public's interest, there does not appear to be a police power purpose supporting the statute. Miller v. Board of Public Works, 195 Cal.477, 234 P. 381, 38 ALR 1479, error dismissed, 273 US 781, 71 L.Ed. 889, 47 S.Ct. 460.

The final version of AB 1275, which became Chapter 453, section 12 of the acts of 1985, stated the following :

> " This bill would amend the State Bar Act to, among other things, make various changes in the procedure for disciplining of attorneys, including that these proceedings are under the jurisdiction of the State Bar Court rather than disciplinary boards, providing that the Board of Governors may order the involuntary inactive enrollment of an attorney upon the finding that the attor-

neys' conduct poses an imminent threat of harm to the attorneys' clients or to the Public... "

In sum, it was in 1985 the State Bar had convinced the legislature that it could replace the California Supreme Court in the admission, licensing, and suspension of attorneys and the establishment of ethical rules and delegate those judicial functions to a private membership trade group the legislature wanted to license attorneys.

Thus, the involuntary inactive enrollment statute became law, because of a misconception that the State bar association could run a private State Bar Court and license lawyers. Ca. Business and Professions Code section 6007. (1)

On January 15, 1986, Senate Bill 1543 was introduced by Senators Presley and Nielsen, with Senators Ayala and Craven and Assembly Member Allen as co-authors. This bill sought to remove the California State Bar Association from involvement in attorney discipline or competence and create the California Commission on Attorney Discipline and Competency to replace it and for such a Commis-

---

(1) Chapter 6086.6 " Nonattorney members," passed by chapter 453, S. 13, of the aforesaid legislation went beyond the creation of an alleged State Bar Court and also created a Review Department of the State Bar Court. This is, in essence, an attempt to create another layer of court. The bill authorized the Review Board to have 16 members bers, with six such members consisting of non-attorney, public members appointed by state politicians, two by the Governor, two by the Senate Committee on Rules, and two by the Speaker of the Assembly.

sion to act as the administrative arm to the California Supreme Court in the Court's regulation of the legal profession.

However, the California State Bar Association convinced the legislature not to abolish it, by giving it greater judicial power. The statutes passed would suggest the California State Bar Association convinced the legislature the cause of the failures in the attorney discipline system was not the State Bar's defalcations, but those of the California Supreme Court, which needed to be replaced by the legislature licensing lawyers.

Thus, from a position of abolition of the State Bar, the legislature turned full circle and gave it consummate power to discipline

lawyers through a full-blown private State Bar Court.

The Legislative Counsel's Digest stated that the purpose of the bill as follows:

" This bill provides for the hearing of certain disciplinary matters by retired judges or if a retired judge is unavailable, by referees. It would provide for the appointment of a Chief Trial Counsel and specify his duties. It would provide for the Review Department of the State Bar Court and require the creation of a Complainant's Grievance Panel and a Discipline Monitor. It would provide procedures relating to the placement of attorneys on inactive status because of mental disorders or for " related reasons." It would make related changes. And finally, it would require the Board of the State Bar to transmit $ 90,000 by January 15, 1987 to the Controller.(emphasis added)

Whereas successful states have independent boards created by State Supreme Court rule which could never engage in bargaining off cash

for the state's coffers in exchange for being in existence, the California State Bar Association has now involved itself in delivering cash or favors, as herein described to the legislature, in exchange for controlling discipline of attorneys in the State and replacing the California Supreme Court.

This places the California State Bar Association under the legislative branch, divorcing it from its constitutional existtence, which is limited to the Judicial branch under Article 6, section 9 of the California Constitution.

There is no doubt from what has been passed that the California State Bar Association is seen as a money-maker or as a source of pa-

tronage for the legislature, when that could never occur in another state.

In 1988 Assemblyman Willie Brown proposed Senate Bill 4391, which was contingent on the passage of SB 1498. Assemblyman Brown's bill augmented state bar dues, permits the State Bar to raise revenue by any " lawful " means, assessed special dues, set up a Client Security Fund, provides that attorneys have to pay late penalties on dues as dues, provides for suspension for non-payment of penalties, and directs the State Bar, subject to the approval of the Committees of Judiciary of each house of the Legislature, contract with an independent expert for the purpose of developing and imple-

menting a minority and women enterprise program, and providing for mandatory dues to pay for these programs.

The statute that was the Quid Pro Quo for this legislation, SB 1498, gave the California State Bar control over any attorneys' law practice and right to work and abolished all vestiges of licensing by the California Supreme Court in fact.

The Legislative Counsel's Digest stated the following:

" The bill was to change 1) the California State Bar Association, revise standards and procedures, revise the inactive enrollment of attorneys, authorize the imposition of remedies or final discipline (by the California state bar association) short of involuntary inactive enrollment to restrict or supervise an attorney's practice of law...2) providing for fingerprinting of certain members of the State Bar ...

3) revising the duty of an attorney to report judgments against the attorney to include judgments for incompetent representation, 4) adding a duty on attorneys to provide certain ... documents to clients, 5) repealing and enacting a provision for the trial of matters before the State Bar Court to require the appointment of hearing judges (emphasis added) for six-year terms, who would be assisted by compensated referees... ; 5) providing for the finality of the State Bar Court decisions (emphasis added), and for contempt citations for failure to comply with those decisions, 6) requiring the employees of the State Bar Court, to be composed, as specified; 7) repealing and reenacting provisions for the Review Board of the State Bar Court, and establishing the Executive Committee of the State Bar Court, to be composed as specified; 8) requiring any Court which holds an attorney in contempt or which sanctions an attorney for misconduct to notify the State Bar; 9) extending the term of the State Bar Discipline Monitor ... and providing for a surcharge ... 10) authorizing the Supreme Court to delegate its disciplinary powers to the State Bar Court, as specified ; 11) giving the State Bar access to all court records relevant to the competence or performance of its'

members..12) requiring attorneys to furnish client trust fund and other proper records to the State Bar; 13) providing for disbarment or suspension for violation of disciplinary probation (emphasis added); 14) providing for disbarment with or without possibility of readmission (emphasis added); 15) providing for the imprisonment for practicing law when no longer (an active) member of the State Bar or failing to comply with certain orders of the State Bar Court,..(emphasis added); 16) requiring the removal of the name of a disbarred attorney from the name of his or her firm and making it a misdemeanor to employ a disbarred attorney in the practice of law (emphasis added); 17) requiring the imposition of a disciplinary augmentation fee...; 18) providing for refund of unexpended membership fees...19) requiring the establishment of a Client Security Fund, and increasing the maximum surcharge .. 20) requiring the Board of Governors to adopt rules limiting the maximum payment to a single claimant from that fund..., providing for the subrogation for payment made from the fund as a condition of continued practice; 21) prohibiting the maintenance of Attorney Trust accounts in financial institutions which do not agree to report to the State Bar instruments presented against accounts

with insufficient funds...22) prohibiting the commencement of a negligence action against a member of the State Bar except upon the certificate that a copy of the complaint was served on the State Bar... and 23) making various procedural changes with regard to disciplnary matters."

This bill created the new crime of practicing law while enrolled involuntarily as an inactive member of the California State Bar. Ca. Business and Professions Code section 6126 (b).

As finally enacted, SB 1498, which became chapter 1159, turned attorney discipline completely over to the California State Bar Association, permits it to restrict or limit any attorneys' law practice without notice or hearing, or take their career without notice or hearing. It allows the imprisonment of an attorney for a crime of prac-

ticing law while involuntarily enrolled as an inactive member of the State Bar based on an ex parte act of a bar volunteer.

It forces the compelled attorney members to finance legislative programs and conduct them. In fact, it creates a police state for lawyers- they are fingerprinted, ordered to comply with so many unnecessary, intrusive and improper regulations of servitude to the state legislature and its creation, the State Bar, and are subject, not to the rules of ethics of their admitting court, but to irrational, overbroad, and intrusive overregulation and invasion of their judicial duties by the state legislature.

These statutes are not in aid

of the State Bar assisting the Judiciary in attorney discipline, but in taking it over.

II.

The United States and the State Constitutions prohibiting Bills of Attainder invalidate the state legislative scheme for a State Bar Court

The prohibition on Bills of Attainder in Article 1, sections 9 and 10 of the United States Constitution and Article 1, section 9, of the State Constitution, void state statutes which take the life, liberty, or property of United States citizens without judicial due process of law and by legislative fiat.

The prohibition was central to the creation of the United States and was first expressed in the Magna Carta of 1215, which ex-

pressed the prohibition eloquently, in chapter XXIX,:

> " No free man shall be taken, or imprisoned, or disseised of his freehold, or liberties, or free customs or be outlawed, or exiled or otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right." (emphasis added)

As Edwardo Coke in his Institutes described the clause, " No forfeiture can grow by letters patent." The awareness was even in the year 1215 that legislative acts whereby property or lives or liberty was taken by parliamentary act or kingly prerogative was a corruption of sorts. Coke defended the supremacy of the Common Law over King, Parliament, and government as expressed in the Magna Carta. Lord

Coke who had been Solicitor General and Attorney General, Speaker of the House of Commons and Chief Justice of England, was stripped of position, land, titles in the 1620's, and in his seventies, imprisoned for treason in the Tower of England, due to his refusal to permit the King to overthrow this common law.

Lord Coke said, " " No free man shall be taken or imprisoned except upon the Due Course of the law."

It was Coke's dedication as a Jurist that lead the American Revolution's call to arms and gave the first American Patriots their zeal to separate their government into three discrete parts and prohibit their encroachment on each other. Central to that

principle was the prohibition on the Bills of the taint of the blood, or the corruption of the blood, commonly called Bills of Attainder.

Early in our history, this Court stated in Ex Parte Garland, 4 Wall. 333,379, that an attorney could not lose their right to practice law at the " command of the legislature," as follows :

> " The attorney and counsellor being, by the solemn act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right, which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. (emphasis added). It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. "

The judgment of the court refer-

red to is obviously the admitting California Supreme Court, and not the legislatively non-admitting State Bar Court. Yet the state statutes envisage the taking of the right to practice law by legislative fiat and by a legislatively-created, private opponent and competitor court with no admitting court action and for no ethically-prohibited conduct expressed by that admitting court.

It thus appears that California Business and Professions Code sections 6007, 6079, 6079.1, 6086, 6086.5, 6086.65, 6086.8, 6086.10, 6088, 6090.5, 6102, 6068, 6102, the 1988 amendment to 6087, 6095.5,6093, 6103, 6103.5, 6106, 6106.5, 6106.7, 6125, 6126 (b), 6128, 6129, 6140.7, 6146, 6143,

6148, 6152, 6153, 6155, which seek to impose ethical duties on attorneys by legislative will and which have not been approved, as required for all Rules of Professional Conduct, by the attorney's admitting court as required under California Business and Professions Code section 6076, are not only unconstitutional under the required separation of powers, but as legislatively-prohibited Bills of Attainder on attorneys. To the extent Lebbos was charged with violating state statutes and not the Judicially-approved Rules of Professional Conduct, those charges are obviously void.

The question whether a statute or a complex of statutes are unconstitutional Bills of Attainder and

not just a reasonable exercise of limited police power, appears to be whether it is a law or a complex of law which legislatively determine guilt and inflicts punishment upon an identifiable group without provision of the protections of a judicial trial. United States v. Brown, 381 U.S. 337, 445, 447 (1965); United States v. Lovett, 328 U.S. 303, 315-316 (1946); Ex Parte Garland, Supra; Cummings v. Missouri, 4 Wall. 277, 323 (1867).

Since the statutes authorize the State Bar through its' alleged State Bar Court to take the careers and right to work of California attorneys, Ex Parte, and cause the imprisonment of lawyers and with no judicial or other trial, or admitting court action and for no viola-

tion of the ethical standards of their admitting Court, but for a vague statutory standard of " conduct posing a substantial threat of harm to the interests of the public, " a virtual non-standard, all of the statutes read together appear to be unconstitutional Bills of Attainder.

As stated in Fletcher v. Peck, 6 Cranch. 87, 136, " It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."

It was Thomas Jefferson who foresaw the situation in which California now confronts itself, with the legislature licensing

attorneys by legislative act, and depriving them of their right to work and causing their imprisonment by legislative act. In his Notes on the State of Virginia, he said, the following, at pp. 157-158 (Ford. Ed.1894) :

" 173 despots would surely be as oppressive as one... Little will it avail us that they are chosen by ourselves... The government we fought for is one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time...<u>If the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor if made, can it</u>

> be effectual-because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches They have accordingly in many instances, decided rights which should have been left to judicial controversy. " (emphasis added)

As stated in United States v. Brown, supra, " The Bill of Attainder clause is to be liberally construed in the light of its purpose to prevent legislative punishment of designated persons or groups. " The Public never authorized the State Bar or the legislature to decide which lawyers should be removed.

The People, through their constitutional direction, have indicated those in the Judicial branch are separated from those under the Legislative branch.

Article 3, Section 3, California Constitution.

In order to maintain that separation of powers, those in the Judicial branch may not be under the effective control or direction of another branch. Otherwise, there is no required separation of powers and independence of those in the Judicial branch of government as ordered by Article 3, section 3 of the California Constitution. see Calder v. Bull, 3 Dall. 386 and Garner v. Board of Public Works, 341 US 716, 95 L. Ed. 1317, 71 S. Ct. 909, reh denied 342 US 843, 96 L. Ed. 637, 72 S. Ct.21; United States v. O' Brien, 391 US 367, 20 L.Ed.2d. 672, 88 S.Ct. 1673, reh. den. 393 U.S. 900, 21 L.Ed.2d. 188, 89 S.Ct. 63; Joint Anti-

Fascist Refugee Committee v. McGrath, 341 US 123, 95 L. Ed. 817, 71 S.Ct. 624, Opinion of Justice Black; Communist Party of United States v. Subversive Activities Control Board, 367 US 1, 6 L.Ed. 2d. 625, 81 S. Ct. 1357, reh denied 368 US 871, 7 L.Ed. 2d. 72, 82 S. Ct. 20.

A claim that no group is being singled out for special pains and penalties by legislative act fails as no other state has singled out its attorneys to lose their right to work at the hands of legislative fiat or deprived those attorneys of their right to have their own admitting court hear and determine their cause prior to deprivation of their right to work and imprisonment. California attorneys are

the only attorneys targeted to suffer the pain and penalties of loss of work through judicial rule-making of a legislature and with no right to a judicial trial, thus causing California attorneys, as a class, to lose all rights to United States Constitutional due process of law. Ex Parte Garland, supra.

CONCLUSION

The prohibition of Bills of Attainder in the United States and the State Constitutions is intended to prevent the legislature from breaching the required separation of powers of the Judiciary, the Executive, and the Legislative branches of Government, by prohibiting the Legislature assuming the Judicial functions of guilt-

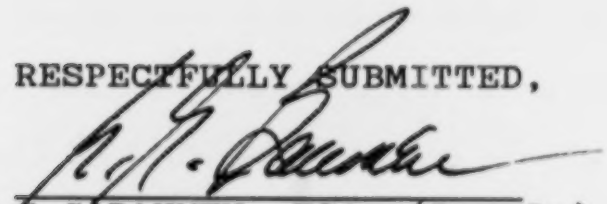
finding, trial, and punishment by legislative act.

It appears that the statutes aforesaid do attempt to invade the Judiciary's duty to establish the ethical rules for its Court Officers, allow a private legislatively-created State Bar Court to usurp the California Supreme Court's duties, and to take the liberty and property of California attorneys by legislative fiat and with no rights to a judicial trial or admitting court action.

As a result, Amicus requests this Honorable Court hear and decide the Petition and protect California attorneys from the enforcement and recognition of statutes that may not be given Full Faith and Credit or Comity

as they are unconstitutional Bills of Attainder.

RESPECTFULLY SUBMITTED,



G.G.BAUMEN, ESQ. (Pro Se)
Lawyer
1950 Sunset Boulevard
Los Angeles, Ca. 90026

213-484-9161

Amicus Curiae

VERIFICATION

I have read and prepared the foregoing Amicus Curiae Brief for Petitioner and Motion and declare under penalty of perjury that it's contents are true and correct, based on my own personal knowledge, information, and belief, and this Verification is executed this 13th day of November, 1990 1989 at Los Angeles, California.

RESPECTFULLY SUBMITTED,

G.G.BAUMEN, ESQ.(Pro Se)
Lawyer
1950 Sunset Boulevard
Los Angeles, Ca. 90026

213-484-9161

Amicus Curiae